IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

AZTEC ENVIRONMENTAL, INC., et al.,

Plaintiffs,

v. CASE NO. 4:05cv399-RH/WCS

MICHAEL W. WYNNE in his capacity as SECRETARY OF THE AIR FORCE,

Defendant.

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ORDER DENYING PRELIMINARY INJUNCTION

In this action plaintiff Aztec Environmental, Inc., challenges the Air Force's issuance of a notice of proposed debarment. Under the governing regulations, the notice precludes any award of a government contract to Aztec until a final debarment decision is made. Aztec has moved for a preliminary injunction that would allow the awarding of contracts to Aztec during the pendency of the debarment proceedings and this litigation. Because Aztec has not demonstrated a substantial likelihood of success on the merits, I deny the motion.

I. Background

Aztec is an environmental remediation and construction firm that has participated in the United States Small Business Administration's 8(a) program for about five years.[1] Aztec has performed numerous government contracts, and at the time Aztec was proposed for debarment, nearly 80% of Aztec's annual revenues were derived from 8(a) awards. (Aff. of Wayne C. Loper, doc. 12).

In November 2002 Aztec entered a contract to remove oil, grease, and other waste from storage tanks at Tyndall Air Force Base, Florida. In July 2003 Aztec entered a contract to remove asbestos from an Air Force building at Hurlburt Field, Florida. Several federal agencies and the Florida Department of Law Enforcement investigated Aztec's performance of these contracts. A report by the Air Force Office of Special Investigations concluded that Aztec violated state and federal environmental laws in the course of the Tyndall and Hurlburt contracts by illegally dumping oil and improperly handling and disposing asbestos. (Aztec Environmental Administrative Record, hereinafter "AEAR," at 304). The report also noted that Aztec hired illegal aliens and secreted them onto military bases to

[1] "The SBA's 8(a) B[usiness] D[evelopment] Program, named for a section of the Small Business Act, is a business development program created to help small disadvantaged businesses compete in the American economy and access the federal procurement market." Small Business Administration, *SBA 8(a)BD Frequently Asked Questions*, *at* http://www.sba.gov/8abd/indexfaqs.html (last modified August 13, 2001).

perform Aztec contracts. (AEAR at 307).

On September 8, 2005, the Air Force notified Aztec and affiliated companies and individuals that they were proposed for debarment. Under the Federal Acquisition Regulations ("FAR"), 48 C.F.R. §9.400 *et seq.*, a "notice of proposed debarment" leaves intact existing government contracts but prevents solicitation or receipt of new contracts. A contractor stays in "notice of proposed debarment" status for no more than sixty days—unless the period is extended—while the debarring official collects evidence, hears argument, and decides whether to debar the contractor. 48 C.F.R. 9.406-3. If debarment is imposed, the exclusion is generally for a period of three years. 48 C.F.R. 9.406-4.

The notice of proposed debarment in this case complied with all relevant portions of the FAR and included a memorandum detailing the reasons for the proposed debarment—the violations described in Office of Special Investigations report. On October 4, 2005, the Air Force provided Aztec with a redacted copy of the administrative record.

On October 26, 2005, Aztec commenced this lawsuit, challenging issuance of the notice of proposed debarment under the Administrative Procedure Act ("APA"), 5 U.S.C. §551 *et seq.*, and the due process clause of the Fifth

Amendment.[2] Aztec moved for a temporary restraining order and a preliminary injunction. By prior order, I denied Aztec's motion for a temporary restraining order.

At a telephonic status conference in this action on December 21, 2005, the Air Force indicated Aztec has continued to submit materials for consideration in the administrative debarment proceeding and that, as a result, the Air Force has not made a debarment decision. Aztec indicated it would finish supplementing the administrative record by January 13, 2006, and at that time would be prepared for the Air Force to move forward in the debarment process.

II. Standard of Review

The court may grant a preliminary injunction "only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Seigel v. Lapore*, 234 F.3d 1163, 1176 (11th Cir. 2000)(en banc); *see also Charles H. Wesley Education Foundation, Inc. v. Cox*, 408 F.3d

[2] Aztec named as defendants both the Secretary of the Air Force and the debarment officer. For convenience, I refer to defendants as the Air Force.

1349, 1354 (11th Cir. May 12, 2005); *McDonald's Corp. v. Robinson*, 147 F.3d 1301, 1306 (11th Cir. 1998). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites." *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir.2003) (citation and quotation omitted). "Because each of the four elements must be proven to secure injunctive relief, '[i]f any element is not proven, there is no need to address the others.'" *Nationwide Equipment Company v. Allen*, 2005 WL 1228360 (M.D. Fla. May 24, 2005) (quoting *Sofarelli v. Pinellas County*, 931 F.2d 718, 724 (11th Cir.1991)).

III. Discussion

Aztec's challenge to the Air Force's issuance of the notice of proposed debarment raises two issues: whether issuance of the notice was arbitrary and capricious or an abuse of discretion and thus should be set aside under the APA, and whether barring Aztec from obtaining contracts during the pendency of debarment proceedings constituted a procedural due process violation. For the reasons discussed below, Aztec has not demonstrated a likelihood of success on either issue. The other three elements of the test for issuing a preliminary injunction thus need not be addressed.

A. Issuance of the Notice of Proposed Debarment under the APA

Under the APA, the court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). This is a deferential standard. "If the reviewing court finds a reasonable basis for the agency's action, the court should stay its hand even though it might, as an original proposition, have reached a different conclusion." *Latecoere Intern, Inc. v. United States Dep't of the Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (citations omitted); *see also Kirkpatrick v. White*, 351 F.Supp.2d 1261 (N.D. Ala. 2004) (finding decision not to terminate contractor's suspension *ab initio* arbitrary and capricious as to some charges but not others). Judicial review of agency action is generally limited to the administrative record. *See Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238, 244 (2001).[3]

The administrative record in this case consists of (1) the notices of proposed debarment and the attached memorandum in support (AEAR 1-116), (2) various notices from the Air Force concerning pending contracts (AEAR 117-126), (3)

[3] The Air Force asserts the court cannot review the issuance of the notice of proposed debarment because the issuance of the notice was not final agency action and because Aztec has not exhausted its administrative remedies. These assertions need not be addressed at this time, because even if the Air Force's actions are reviewable, Aztec has not demonstrated a substantial likelihood of success on the merits, as set forth in the text below.

public business records of Aztec (AEAR 127-302), (4) the OSI report including interviews and documents related to the Tyndall Air Force Base, Hurlburt Field, and illegal alien investigations (AEAR 303- 1632), (5) Hurlburt Field airborne asbestos monitoring reports (AERA 1633-1699), (6) submissions from Aztec including argument and evidence of present responsibility (AERA 1700-1892), and (7) additional business records including Aztec contracts with the government entered between 2002 and 2005 (document 12).

Based on this record, Aztec has not demonstrated a substantial likelihood that it will prevail on the claim that the Air Force acted in an arbitrary and capricious manner or abused its discretion when it proposed Aztec for debarment. Nor was the proposal otherwise not in accordance with law. To the contrary, the Air Force properly may propose debarment of a contractor when, based on past performance, there is reason to believe the contractor is not presently responsible. *See, e.g.*, 48 C.F.R. 9.406; *see also Lion Raisins*, 51 Fed. Cl. at 249, *Sloan v. Dep't of Housing & Urban Development*, 231 F.3d 10, 16 (D.C. Cir. 2000), *Silverman v. United States Dep't of Defense*, 817 F.Supp. 846, 849 (S.D. Cal. 1993). Here there is substantial evidence of serious misconduct by Aztec in the none-too-distant past. Thus, for example, the record includes evidence that Aztec improperly handled and disposed of asbestos during the course of the Hurlburt field contract and that plaintiff Jimmy Livingston (a corporate vice-president and the husband of Aztec

chief executive officer Debbie Livingston) attempted to conceal the impropriety from inspectors. (AEAR at 305, 379, 400-01). Mr. Livingston remains in his position with Aztec.

To be sure, Aztec has been awarded other government contracts since the alleged misconduct. But Aztec's assertion that this proves its present responsibility is not correct. It may ultimately be determined, either in the administrative process or on judicial review, that Aztec is presently responsible and thus ought not be debarred. But the Air Force can hardly be faulted for issuing the notice and going forward with administrative proceedings designed to determine whether Aztec is or is not presently responsible. If Aztec ultimately is determined not to be a responsible contractor, the fact that other contracts were imprudently awarded to Aztec will not be a reason to keep making the same mistake time and again.

In sum, the Air Force's decision to initiate debarment proceedings was not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Due Process and the Federal Acquisition Regulations

The Federal Acquisition Regulations were adopted in roughly their current

form in 1983. Between 1983 and the present, courts have consistently upheld the regulations against due process attack. *See, e.g.*, *Sloan*, 231 F.3d at 19; *Imco, Inc. v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996); *Girard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991). Aztec has cited no decision to the contrary, and I am aware of none.

The due process clause of course applies to deprivations of life, liberty, or property. Aztec apparently has no property interest in continued government contracting, *see, e.g.*, *Bank of Jackson Co. v. Cherry*, 980 F.2d 1354, 1357 (11th Cir. 1992) ("suspended or debarred contractors have no property interest in doing business with the government"), and whether Aztec has a liberty interest (and whether any such interest would support a preliminary injunction of the type Aztec now seeks rather than only an opportunity for a later name-clearing hearing) may not be clear. Even assuming, however, that Aztec was entitled to due process prior to issuance of the notice of proposed debarment, Aztec has not shown a likelihood that it will prevail on its due process claim. The Air Force has afforded Aztec notice and an opportunity to be heard; due process, in this context, requires nothing more. Indeed, Aztec's real complaint is not that the Air Force has refused to hear what Aztec has to say, but that the Air Force has failed, at least so far, to agree with Aztec's positions. Aztec has suffered no due process violation.

IV. Conclusion

Aztec has not demonstrated a substantial likelihood of prevailing on the merits of its claims challenging the Air Force's issuance of a notice of proposed debarment. Accordingly,

IT IS ORDERED:

Plaintiff's motion for a preliminary injunction (document 3) is DENIED.

SO ORDERED this 6th day of January, 2006.

s/Robert L. Hinkle
Chief United States District Judge